

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

Docket No. FIFRA-08-2004-0012

IN THE MATTER OF:

**Mouse Out, LLC
308 East Denver Street
Holyoke, Colorado**

Respondent.

**COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING**

COMPLAINT

This civil administrative action is instituted pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (EPA) by section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA" or "the act"), 7 U.S.C. section 136l(a). Complainants are supervisors in the Legal Enforcement Program and the Technical Enforcement Program within the Office of Enforcement, Compliance and Environmental Justice, Region 8, EPA, who have been duly authorized to institute this action. This proceeding is subject to EPA's "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits," 40 C.F.R. part 22 ("Consolidated Rules of Practice").

DEFINITIONS

1. ***Pesticide*** is defined by 40 C.F.R. § 152.3(s) as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, or intended for use as a plant regulator, defoliant, or desiccant"

2. ***Make Available for Use*** is defined by 40 C.F.R. § 171.2(b)(2) as “to distribute, sell, ship, deliver for shipment, or receive and (having so received) deliver, to any person. However, the term excludes transactions solely between persons who are pesticide producers, registrants, wholesalers, or retail sellers, acting only in those capacities.”
3. ***To Distribute or Sell*** and other grammatical variations of the term such as “distributed or sold” and “distribution or sale,” is defined by 40 C.F.R. § 152.3(j) as “the acts of distributing, selling, offering for sale, holding for sale, shipping, holding for shipment, delivering for shipment, or receiving and (having so received) delivering or offering to deliver, or releasing for shipment to any person in any State.”

GENERAL ALLEGATIONS

4. EPA has jurisdiction over this matter pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. Section 136l(a)(1).
5. Respondent, Mouse Out, LLC, is a "person" within the meaning of section 2(s) of FIFRA, 7 U.S.C. section 136(s), and is therefore subject to regulation.
6. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), provides that it shall be unlawful for any person in any State to distribute or sell to any person any pesticide that is not registered under section 136a of FIFRA, 7 U.S.C. §136a.
7. Generally, a claim to control, repel, mitigate, kill or destroy a microorganism is a pesticidal claim and requires compliance with section 3 of FIFRA, 7 U.S.C. § 136a.
8. Respondent manufactures and markets a substance with claims that the substance is effective in repelling rodents, with particular application in and around farm equipment.

9. EPA, in a *Final Rule* promulgated on May 4, 1988 in 53 Fed. Reg. 15977, and codified at 40 C.F.R. § 152.25, has published applicable criteria used to evaluate those products which are considered to be pesticides. Additionally, in that rule, EPA lists exemptions for certain products from pesticide registration requirements, and also describes procedures for registration, classification, cancellation, and suspension of pesticides.
10. It is a violation of FIFRA and also unlawful conduct for any person in any State to distribute or sell to any person any pesticide that is not registered under section 136a of FIFRA, except to the extent that distribution or sale otherwise has been authorized by the EPA Administrator.
11. FIFRA provides that the term “distribute or sell” means “to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.” FIFRA sec. 2(gg), 7 U.S.C. § 136(gg).
12. This complaint alleges that Respondent failed to comply with section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by offering for sale unregistered pesticidal products for which unauthorized pesticidal claims were made as a part of that products’ sale and distribution.

COUNT 1
(Sale of an Unregistered Pesticide)

13. Paragraphs one through twelve of the general allegations are incorporated by this reference and set out as if fully stated herein.
14. Respondent sells and distributes a substance it markets as “Mouse Out.”

15. On or about November 19, 2002, Respondent sold or distributed its product "Mouse Out" to Morris Mancronel of Conrad, Montana.
16. Regarding the above-described sale or distribution, Respondent supplied documentation containing pesticidal claims, to wit: that use of the product "Gets Rid of ALL you [sic] 'Pesky' Squeaks;" a product called "Mouse Out" by the name itself contains a pesticidal claim; and, the graphic image depicting a hobo mouse implies a pest control effect.
17. Respondent's conduct of making pesticidal claims for an unregistered product as set out above, constitutes one violation of 40 C.F.R. 167.85 and therefore one violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

PROPOSED CIVIL PENALTY

Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1) and 40 C.F.R. Part 19, authorizes the assessment of a civil penalty of up to \$5,500.00 for each day of each violation of FIFRA. Agency policy with respect to assessment of civil penalties under FIFRA is governed by EPA's Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), July 2, 1990, which provides a rational and consistent method for applying the statutory penalty factors to the circumstances of specific cases. A copy is enclosed as Complainant's Ex. 1.

In arriving at the assessment of the penalty specified below, EPA, as required by section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), has taken into consideration the following, as known to Complainant at this time:

- The size of Respondent's business;
- Respondent's ability to continue in business in light of the proposed penalty; and
- The gravity of the alleged violation(s).

The reasoning behind the proposed penalty in this matter is detailed in the penalty calculation worksheets and accompanying narrative, incorporated herein by reference and enclosed as Complainant's Ex. 2.

Based on the above considerations, EPA proposes to assess the following civil penalty for each of the violations described above:

COUNT I	\$ <u>4,950</u>
TOTAL PROPOSED PENALTY	\$ 4,950

TERMS OF PAYMENT

If you do not contest the findings and assessments set out above, payment of the penalty for the violations may be forwarded to EPA. Payment must be made, within (thirty) 30 calendar days of receipt of this complaint, by sending a certified or cashier's check payable to "Treasurer, United States of America," in care of:

U. S. EPA, Region 8
(Regional Hearing Clerk)
Mellon Bank
P. O. Box 360859M
Pittsburgh, PA 15251

A copy of the check must be mailed simultaneously to the attorney listed below.

Payment of the penalty in this manner shall constitute consent by the Respondent to the assessment of the penalty and a waiver of the Respondent's right to a hearing on this matter.

NOTICE OF OPPORTUNITY FOR HEARING

This administrative civil penalty proceeding will be conducted pursuant to the Consolidated Rules of Practice, 40 C.F.R. part 22, a copy of which is enclosed with this complaint. Pursuant to these rules, you have the right to request a hearing to contest any factual allegation set forth in the complaint or the propriety of the proposed penalty. If you (1) wish to contest the factual claims made in this Complaint; (2) wish to contest the propriety of the proposed penalty; or (3) believe that you are entitled to judgment as a matter of law, you must file a written answer and a copy within thirty (30) days after this Complaint is served. Should you choose to contest any aspect of this Complaint your answer must (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint; (2) briefly state all facts and circumstances, if any, which

constitute grounds for a defense; (3) state the facts which you dispute; and (4) specifically request an administrative hearing, if desired. Failure to deny any of the factual allegations in the Complaint will constitute an admission of the undenied allegations. The Answer and a copy shall be sent to the EPA Region 8 Hearing Clerk, 999 - 18th Street, Suite 300, Denver, Colorado 80202-2466. Please send a copy of the Answer and all other documents which you file in this action to the attorney noted below.

IF YOU FAIL TO REQUEST A HEARING, YOU WILL WAIVE YOUR RIGHT TO FORMALLY CONTEST ANY OF THE ALLEGATIONS SET FORTH IN THE COMPLAINT.

IF YOU FAIL TO FILE A WRITTEN ANSWER WITHIN THE THIRTY (30) CALENDAR DAY TIME LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURSUANT TO 40 C.F.R. § 22.17. THIS JUDGMENT MAY IMPOSE THE PENALTY PROPOSED IN THE COMPLAINT.

You are further informed that the Consolidated Rules of Practice prohibit any *ex parte* (unilateral) discussion of the merits of any action with the Regional Administrator, Regional Judicial Officer, Administrative Law Judge, or any person likely to advise these officials in the decision of the case.

SETTLEMENT CONFERENCE

EPA encourages all parties against whom a civil penalty is proposed to pursue the possibility of settlement as a result of an informal conference. Therefore, whether or not you request a hearing, you may confer informally with the Agency concerning (1) whether the alleged violations in fact occurred as set forth above, or (2) the propriety of the proposed penalty in relation to the size of your operation, the gravity of the violation, and the effect of the proposed penalty on your ability to continue in business. The request for an informal conference does not stay the running of the thirty (30) day time period for requesting a hearing and filing an answer.

To explore the possibility of settlement in this matter or if you have questions, please contact the attorney listed below.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION VIII,
OFFICE OF ENFORCEMENT, COMPLIANCE,
AND ENVIRONMENTAL JUSTICE,

Complainant.

Date: September 20, 2004

By: David Rochlin for M. Risner
Michael T. Risner, Director
David J. Janik, Supervisory Enforcement
Attorney
Legal Enforcement Program

Date: 20 September 2004

By: SIGNED
Elisabeth Evans, Director
Technical Enforcement Program

Date: Sept. 20th 2004

By: SIGNED
Dana J. Stotsky
Senior Enforcement Attorney
Legal Enforcement Program
Colorado Bar # 14717
Phone: (303)-312-6905
FAX: (303) 312-6953

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the COMPLAINT, AND NOTICE OF OPPORTUNITY FOR HEARING with Exhibits were hand-carried to the Regional Hearing Clerk, EPA Region 8, 999 18th Street, Denver, Colorado, and that a true copy of the same was sent via certified mail to:

Mr. Dennis H. Weaver
Mouse Out, LLC
308 East Denver Street
Holyoke, CO 80734

September 21, 2004
Date

SIGNED _____
Judith McTernan

IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE REGIONAL HEARING CLERK.

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON SEPTEMBER 21, 2004.